

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Petitioner,)
)
vs.) Case No. 07-3207
)
JOSÉ FERNANDO ARISTIZABAL and)
LILIANA URREA ARISTIZABAL,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On July 1-2, 2008, a formal administrative hearing was held in this case in Bartow, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph J. Ward, Esquire
Southwest Florida Water
Management District
2379 Broad Street
Brooksville, Florida 34604-6899

For Respondents: José Fernando Aristizabal, pro se
Liliana Urrea Aristizabal, pro se
6650 Southwest 189th Way
Southwest Ranches, Florida 33332

STATEMENT OF THE ISSUES

The issues in this case include: whether the Respondents constructed berms and ponds and dug ditches and filled wetlands on their Property in Highlands County without required permits, as alleged by the Southwest Florida Water Management District (SWFWMD) in its Administrative Complaint; and, if so, whether the

Respondents are entitled to an agricultural exemption or an agricultural closed system exemption under Section 373.406(2)-(3), Florida Statutes.

PRELIMINARY STATEMENT

On or about June 11, 2007, SWFWMD filed and served an Administrative Complaint and Order on Respondents. On July 3, 2007, Respondents requested an administrative hearing. After the request was forwarded to DOAH, a final hearing was scheduled for November 14-16, 2007, in Bartow. However, a Joint Motion for Continuance was granted, and the final hearing was re-scheduled for March 5-7, 2008. For various reasons, the final hearing was again re-scheduled, ultimately to July 1-3, 2008.

At the final hearing, SWFWMD called as witnesses: Harry Clark Hull, Jr., its Director of Environmental Permitting; Jessie Graham Watson, III, a Senior Field Technician with SWFWMD; José Fernando Aristizabal; Jeffrey Brent Whealton, a Senior Agricultural Environmental Scientist with SWFWMD; and Alex Aycrigg, an Environmental Scientist with SWFWMD. SWFWMD also had admitted in evidence its Exhibits 1, 3, 5, 10-22, 24-27, 34, and 43-49, plus Exhibits 4-7, 9, and 15 to the deposition of Mr. Aristizabal, which was identified as SWFWMD 37. The Respondents re-called Messrs. Whealton, Hull, Aycrigg, and Aristizabal and called Kenneth Griner, a civil engineer with SWFWMD, as their witnesses. They also had their Exhibits 1 and 8 admitted in evidence, along with SWFWMD Exhibit 59.

During the hearing, the Respondents raised a new defense under Section 373.406(6), Florida Statutes, for "activities that the district or department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district." SWFWMD objected to the new defense as being untimely, and the objection was sustained.

After the presentation of the evidence, SWFWMD ordered the preparation of a Transcript, and the parties were given ten days from the filing of the Transcript to file proposed recommended orders (PROs). The Transcript was filed on August 4, 2008, and SWFWMD's timely-filed PRO has been considered in the preparation of this Recommended Order. The Respondents did not file a PRO.

FINDINGS OF FACT

Respondents' Activities on the Property

1. In August 2003, the Respondents, José Fernando and Liliana Urrea Aristizabal, bought approximately 30 acres of land in Highlands County, near Lake Placid, south of Miller Road, to use for a palm tree nursery. This land (the Property) is in Section 30, Township 36 South, Range 29 East. There was a large marsh approximately in the center of the Property with additional wetlands surrounding the large marsh.

2. On December 31, 2003, and again in February 2004, representatives of SWFWMD informed Mr. Aristizabal that, due to the presence of relatively high-quality wetlands on the Property,

the plant nursery he intended to establish there would require an application for an environmental resource permit (ERP).

3. After receiving this information from SWFWMD, Mr. Aristizabal retained a consultant to advise him. The consultant advised Mr. Aristizabal on how to construct an irrigation system that would be effective and permittable; however, the consultant cautioned him that construction would have to avoid impacting the wetlands on the Property. The consultant also advised Mr. Aristizabal as to the location of the wetlands on the Property, as well as the location of "potential wetlands."

4. In response to the consultant's advice, Mr. Aristizabal dug a circular ditch around the large marsh in the center of the Property, with additional linear ditches radiating from the central, circular ditch and intersecting with a second, larger ditch around most of the perimeter of the irrigation system, extending along the east, north, and west sides of the Property. The ditches are approximately 5-7 feet wide and 5-7 feet deep. The soil from the ditches was spread between the linear ditches to raise the ground level and create planting beds. Mr. Aristizabal also deposited fill to the north and east of the perimeter ditch to create a berm approximately 4-6 feet wide and 2-4 feet high.

Effects on Surface Waters of the State

5. The evidence proved that there were approximately 11.64 acres of wetlands on the Property, including the large central marsh. Most of the ditches dug by Mr. Aristizabal and most of the fill deposited by him between the ditches were in wetlands. In all, approximately 0.86 acres of the wetlands on the Property were dredged, and approximately 4.97 acres of the wetlands on the Property were filled. The ditches intercept, divert, and impound surface water.

6. The berms--particularly, the berm on the north side of the Property--also obstruct the flow of surface water.

Agricultural Exemption Defense

7. The Respondents did not apply for an agricultural exemption under Section 373.406(2), Florida Statutes, from the requirement to obtain an ERP. Instead, they raised the exemption as a defense to SWFWMD's enforcement action.

8. Regarding the agricultural exemption defense, Mr. Aristizabal's berms and his ditching and filling of wetlands impounded, impeded, and diverted the flow of surface waters. These effects more than incidentally trapped or diverted some surface waters, e.g., as occurs when a pasture is plowed. For that reason, the activities were not consistent with the practice of agriculture.

9. Even if those activities might be considered to be consistent with the practice of agriculture, they had the

predominant purpose of impounding or obstructing surface waters. The berms and the ditching and filling of wetlands obstructed surface waters in that they had the effect of more-than- incidentally diverting surface water from its natural flow patterns. The ditches also impounded surface waters. SWFWMD reasonably determined that the predominant purpose of the berms and the ditching and filling of wetlands was to impound, impede, divert, and obstruct the flow of surface waters.

Agricultural Closed System Exemption Defense

10. The Respondents did not apply for an agricultural closed system exemption under Section 373.406(3), Florida Statutes. Instead, they raised the exemption as a defense to SWFWMD's enforcement action.

11. The Respondents did not prove that their construction resulted in an "agricultural closed system." Rather, the evidence was that surface waters of the state are discharged from, and onto, the Property during most years.

Requested Corrective Action

12. SWFWMD seeks alternative corrective action by the Respondents: expeditiously apply for and obtain an after-the-fact permit; or expeditiously submit and perform an acceptable plan to restore the land to its natural grade and to remediate as necessary to restore any loss of wetland functions. The specifics of the requested alternative corrective action are set out in paragraphs 19 and 20 of the Administrative Complaint.

13. The requested alternative corrective actions are reasonable.

CONCLUSIONS OF LAW

14. DOAH's jurisdiction over this case is undisputed and clear. See §§ 120.569 and 120.57, Fla. Stat. (2007).

15. SWFWMD is the administrative agency charged with the responsibility to conserve, protect, manage, and control the water resources of the state within its geographic boundaries, and to administer and enforce Chapter 373, Florida Statutes, and Florida Administrative Code Rule Chapters 40D-4 and 40D-40. SWFWMD's jurisdiction is part of its enforcement case, and SWFWMD has the burden to prove that the Respondents' alleged activities required SWFWMD permits.

16. SWFWMD must prove its case-in-chief by a preponderance of the evidence. See SJRWMD v. Modern, Inc., et al., 784 So. 2d 464 (Fla. 1st DCA 2001), aff'g, DOAH Case Nos. 97-4389, etc. (SJRWMD Dec. 9, 1999; DOAH June 15, 1999).

17. The Respondents have the burden of proof on their exemption defenses. Citing Hough v. Menses, 95 So. 2d 410, 412 (Fla. 1957), and Key v. Trattman, 959 So. 2d 339, 345 (Fla. 1st DCA 2007), SWFWMD agrees that the standard of proof to be imposed on the Respondents as to their exemption defenses is a preponderance of the evidence.

18. As SWFWMD points out, as a statute enacted to protect the public health, safety, and welfare from further harm to water

resources, Chapter 373, Florida Statutes, must be "liberally construed in order to effectively carry out its purposes." § 373.616, Fla. Stat. (2007). Conversely, an exemption is strictly construed against the party claiming the exemption. See Samara Development Corp. v Marlow, 556 So. 2d 1097, 1100 (Fla. 1990); Heburn v. Dept. of Children and Families, 772 So. 2d 561, 563 (Fla. 1st DCA 2000); Pal-Mar Water Management District v. Martin County, 384 So. 2d 232 (Fla. 4th DCA 1984).

Proof of Alleged Violations

19. The evidence proved that the Respondents' activities-- including the berms and the dredging and filling of wetlands-- constituted the construction or alteration of a "surface water management system," as defined by Florida Administrative Code Rule 40D-4.021, and "works," as defined by Section 373.403(5), Florida Statutes. As such, a permit was required under Florida Administrative Code Rules 40D-4.041 and 40D-44.041.

Agricultural Exemption Defense

20. Section 373.406(2), Florida Statutes, states:

Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

21. Section 403.927(4) (a), Florida Statutes, states:

"Agricultural activities" includes all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting, harvesting, construction of access roads, and placement of bridges and culverts, provided such operations do not impede or divert the flow of surface waters.

22. The Conference Committee Report on CS/CS/HB 1187, Journal of the House of Representatives, May 29, 1984, page 734, and Journal of the Senate, May 28, 1984, page 475, recommended enactment of the Warren S. Henderson Wetlands Protection Act of 1984, were voted on, and were approved by the House of Representatives and the Senate. Both reports stated in pertinent part:

The language contained in s. 403.913 [now 403.927], relating to agricultural activities, shall be construed in conjunction with s. 373.406(2) to exempt from permitting only those activities defined as "agricultural activities" pursuant to this act in accordance with the Commentary to s. 4.02.(2) of the Model Water Code.

23. The Commentary to Section 4.02.(2) states in pertinent part:

The intent of this subsection is to allow persons engaged in agricultural, floricultural, and horticultural operations to engage in ordinary farming and gardening without obtaining a construction permit under §4.04. Theoretically, such operations may incidentally trap or divert some surface water. For example, by plowing a pasture a farmer is trapping and diverting surface water that would have constituted part of the runoff and eventually would have become part of the surface water of the state. Without this exemption the farmer would have theoretically been required to obtain a

permit under §4.04. In addition, it would appear that all changes of topography which would alter natural runoff, such as contour plowing, would also require a construction permit under §4.04. The quantity of the water being diverted and trapped is so small that it would serve no practical purpose to require a permit for such work. In addition, the administrative burden of regulating such operations would be enormous.

24. The Respondents' construction of berms and dredging and filling of wetlands had the effects of impounding and more-than-incidentally trapping, obstructing or diverting surface water of the state. For these reasons, the activities were not exempt under Section 373.406(2), Florida Statutes.

Agricultural Closed System Exemption Defense

25. Section 373.406(3), Florida Statutes, exempts from permitting "the construction, operation, or maintenance of any agricultural closed system. However, part II of this chapter shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system."

26. The Respondents did not prove that their dredging and filling of wetlands was part of "the construction, operation, or maintenance of any agricultural closed system" used to maintain the water levels within the system. It was not proved that the system was closed.

Mrs. Aristizabal is a Proper Party

27. Although the evidence was that Mrs. Aristizabal did not participate in the dredging and filling of wetlands, she is an owner of the Property where the dredging and filling occurred. Unless she was made a party, SWFWMD would not be able to obtain an enforceable remedy for its Administrative Complaint.

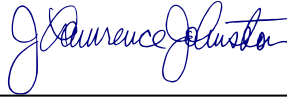
28. Someone who has such an interest in the subject matter of an action that a final adjudication cannot be made without affecting the party's interest is an indispensable party. See Glancy v. First W. Bank, 802 So. 2d 498 (Fla. 4th DCA 2001); W.R. Cooper, Inc. v. City of Miami Beach, 512 So. 2d 324, 326 (Fla. 3d DCA 1987); Phillips v. Choate, 456 So. 2d 556, 557 (Fla 4th DCA 1984).

29. As an owner of the Property where the dredging and filling of wetlands occurred, Mrs. Aristizabal not only is a proper party, she is an indispensable party, even though she personally may not have been involved in those activities.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Governing Board enter a Final Order requiring the Respondents to apply for the necessary after-the-fact permit and/or restore wetland impacts, as described in Finding 12, supra.

DONE AND ENTERED this 21st day of August, 2008, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of August, 2008.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.